SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 203

H. D. RYAN AND L. G. HOWARD, TRADING AS KEYSTONE TRANSFER COMPANY,

Petitioners,

vs.

THE PENNSYLVANIA PUBLIC UTILITY COMMISSION.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

The first question presented is the refusal of the Supreme Court of Pennsylvania to entertain an appeal from the final order of the Superior Court affirming the order of the Public Utility Commission.

Petitioners at the hearings before the Public Utility Commission contended that the operations herein involved were interstate in nature and under the exclusive jurisdiction of the Interstate Commerce Commission. Petitioners introduced as their Exhibit L (R. 373) an order of the Interstate Commerce Commission taking jurisdiction and authorizing the operations in question under authority of the Federal Motor Carrier Act (49 U. S. C. A. 301 *et seq.*) The

petitioners in their appeals to the Superior Court and the Supreme Court of the State set forth the Federal Statute and Federal questions involved.

It is therefore submitted that under the Public Utility Law, Act of May 28, 1937, P. L. 1050, section 1109, the Supreme Court by the mandate of the Statute was obliged to hear the appeal to it. However, the Supreme Court of Pennsylvania by its order of March 24, 1941, refused to entertain the appeal. Thus it is contended that the refusal of the court has taken from petitioners a valuable right given it by the mandate of the statute which amounts to a violation of procedural due process guaranteed to every citizen by the Fourteenth Amendment to the Federal Constitution.

The second question presented here is whether a motor carrier operating in interstate commerce as a reasonable and necessary incident to such commerce under authority of the Interstate Commerce Commission may be ordered by a State regulatory body to cease and desist from such operation.

Some time prior to 1935 the advent of the Federal Motor Carrier Act 1935 (49 U. S. C. A. 301 *et seq.*), the petitioners herein began operating from Wheeling, West Virginia to Washington and Uniontown, Pennsylvania and points in the States of West Virginia and Ohio, and in the reverse direction and the transportation of property between such points via Wheeling, West Virginia. With the advent of the Federal Motor Carrier Act petitioners filed an application under the so-called "grandfather" clause of the Federal Motor Carrier Act (49 U. S. C. A. 306 (a)), which provides:

> "Provided, however, that * * * if any such carrier or a predecessor in interest was in bona fide operation as a common carrier by motor vehicle on June 1, 1935 over the route or routes or within the territory for

which application is made and has so operated since that time, * * * the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation and without further proceedings * * * and if such carrier was registered on June 1, 1935 under any code of fair competition requiring registration the fact of registration shall be evidence of bona fide operation to be considered in connection with the issuance of such certificate * * * pending the determination of any such application the continuance of such operation shall be lawful."

The Interstate Commerce Commission, acting upon said application, found by its Order of September 5, 1939 (R. 373) that petitioners were in bona fide operation over the routes described therein including the operations herein involved. Thus, the Interstate Commerce Commission had clearly assumed jurisdiction over the operations complained against. Such jurisdiction having been taken, the State Public Utility Commission had no authority over the operations. The Order of the Pennsylvania Public Utility Commission of September 4, 1940 ordering petitioners to cease and desist and assessing a fine of $1,500.00 was void, and in violation of Article I, Section 8, Clause 3 of the Constitution of the United States.

It is well settled in the law that once the Federal Government has entered the field of interstate commerce it is supreme, and the power of the State to regulate interstate commerce ceases. So here Congress by enacting the Federal Motor Carrier Act of 1935 intended to regulate all commerce by motor vehicle in interstate commerce. Under Section 203(a)(10) of the Act Congress defined interstate commerce to mean:

"* * * commerce between any place in a state and any place in another state or between places in the same state through another state * * *"

Thus, the Federal Government, by entering the field of regulation here involved, has completely ousted the State of any jurisdiction.

See *Chicago R. I. & P. Ry. Co.* v. *Hardwick Farmers Elevator Co.*, 226 U. S. 426 (1913) at page 435:

> "* * * the elementary and long settled doctrine is that there can be no divided authority over interstate commerce and that the regulations of Congress on that subject are supreme. It results, therefore, that in a case where from the particular nature of certain subjects the State may exert authority until Congress acts under the assumption that Congress by inaction has tacitly authorized it to do so, action by Congress destroys the possibility of such assumption, since such action, when exerted, covers the whole field and renders the State impotent to deal with a subject over which it had no inherent but only permissive power."

See also *McNeely and Price Co.* v. *Philadelphia Piers, Inc.*, 329 Pa. 113 (1938); *Sproles* v. *Binford*, 286 U. S. 374 (1932); *South Carolina State Highway Department* v. *Barnwell Brothers, Inc.*, 303 U. S. 177 (1938); *H. P. Welch Co.* v. *New Hampshire*, 59 S. Ct. 438 (1939).

The order of the Interstate Commerce Commission (R. 373) provided, among other rights, the authority to transport general commodities between Pittsburgh, Pennsylvania and Wheeling, West Virginia, between Wheeling, West Virginia and Uniontown, Pennsylvania, and between Pittsburgh, Pennsylvania and Washington, Pennsylvania. The Interstate Commerce Commission for means of convenience have used this type of description in describing the points to be authorized to be served by applicants under the "grandfather" clause. As has been shown, the petitioners were performing this operation prior to the advent of the Act and under the application as filed the above order was issued. It is to be noted that this order was issued Septem-

ber 5, 1939. On April 3, 1940 Division 5 of the Interstate Commerce Commission designated the Motor Carrier Division, adopted special terms, conditions, and limitations to the exercise of privileges granted in certificates of common carriers of property by motor vehicle authorized to transport general commodities over regular routes. See Commerce Clearing House, Federal Carriers' Service 3143. Item 4 of this order is as follows:

> "A certificate authorizing operations over two or more routes which have one or more points in common authorizes operations over all combinations of such routes and between all points thereon over the routes specifically described in the certificate."

The Federal Motor Carrier Act, 49 U. S. C. A. 304 (6) provides that the Commission shall have the power

> "To administer, execute, and enforce all provisions of this part to make all necessary orders in connection therewith, and to prescribe rules, regulations, and procedure for such administration."

Thus it is submitted that any order of the Interstate Commerce Commission promulgated by it and in effect at the time the complaint was instituted against the petitioners herein is entitled to great weight and should be conclusive in the interpretation of the rights of petitioners.

It will be noted that the regulation of the Commission of April 3, 1940, has recently been vacated, but not because of the provision referred to herein, but because of other provisions not pertinent here. However, petitioners' rights are to be determined as of the time of the issuance of its compliance order and/or at the time of the complaint being brought.

Under the authority as granted September 5, 1939, the petitioners filed tariffs with the Interstate Commerce Commission covering these specific operations. They do not

have any tariffs on file with the State commission covering points involved in this proceeding (R. 176, 177). These rates are based on some commodities on a mileage basis, and on other commodities the rates are determined on a grouping basis, specifically naming Pittsburgh, Pennsylvania, in one group and Uniontown, Pennsylvania, as another group (R. 421).

It is again pointed out that the requirement and the acceptance by the Interstate Commerce Commission of its duly filed tariffs, covering the exact points involved herein, conclusively show a taking of jurisdiction by the Federal Government, first by the issuance of its order authorizing the operations, and secondly by requiring and accepting tariffs filed thereunder, which tariffs set up rates which not only bind the carrier, but the entire shipping public, and for any violation therefrom the carrier and the shipper would jointly be criminally liable under the laws of the United States.

The Interstate Commerce Commission in Dixie Freight Lines, Inc., Common Carrier Application, M. C. C. 554, 24 M. C. C. 780, passed upon this question and interpreted a similar compliance order. In its original report at 10 M. C. C. 85, the Commission found that applicant was on June 1, 1935, and continuously since, in *bona fide* operation as a common carrier by motor vehicle of general commodities with certain exceptions, in interstate or foreign commerce between Montgomery, Alabama, and Fort Benning, Georgia, via Opelika, Alabama, and Columbus, Georgia, over Route 4 and also between Montgomery, Alabama, and Atlanta, Georgia, via Opelika, Alabama, over Route 3. The first route was granted due to the "grandfather" clause; the second after a finding of public convenience and necessity. Based upon this authorization, the applicant published a tariff and transported property between Atlanta, Georgia, on the one hand, and Columbus and Fort Benning,

Georgia, on the other, via Opelika, Alabama. The Georgia Public Service Commission filed a petition for reconsideration, clarification, and modification of the order. The proceedings were reopened for oral argument. The Georgia Commission and certain motor carrier intervenors asserted that they did not understand applicant had sought or would be granted authority to transport between Georgia points, via Opelika, over an interstate route composed of the respective segments of Routes 3 and 4. There was no contention that any finding in the prior Order was improper *per se*. It was admitted the record justified the conclusion that applicant should be authorized to continue operation over the four different routes, but it was contended that applicants' operations should be confined to the respective routes with no authority to create this additional route by combining routes. The Georgia Commission stated that motor carriers had authority from it to transport between Atlanta and Fort Benning over a route within Georgia; that the distance from Atlanta to Fort Benning over the intrastate route was 28 miles less than over the interstate route via Opelika; and that applicants' use of the latter route was a subterfuge to evade and defeat intrastate regulation.

The Interstate Commerce Commission concludes at page 783:

> "To comply with interveners' request would be contrary to our general policy relative to extension applications, wherein we customarily describe only the proposed route as extended, and if such route is authorized the motor carrier has a right to transport interstate commerce over it to or from any point on its existing routes. This policy avoids duplication of authority."

Thus it is submitted that it is firmly established that the Federal Government has entered not only the general field

of regulation here but has specifically acted with regard to the very operation involved and has found by its order of September 5, 1939, that petitioners were in *bona fide* operation over the routes involved and authorized the continuance of said operations.

The only recent case decided by your Honorable Court which should be pointed out is *Frank Eichholz* v. *The Public Service Commission of the State of Missouri, et al.*, 306 U. S. 268 (1939). In that case Eichholz prior to the passage of the Federal Motor Carrier Act obtained a permit from the State commission to operate as a freight carrier between points in Missouri and points in other States, exclusively in interstate commerce. He did not seek or obtain an intrastate permit. When the State permit was granted, there was in effect a rule of the State commission that no one operating under an interstate permit should accept transportation of property originating and destined within the State. The State commission revoked the permit for violation of the above rule and found that although he operated between points in the same State via another State, yet such a route was merely as a subterfuge to violate the outstanding permit.

It is thus to be noted that in that case the violation was of a State permit granted to Eichholtz upon the condition that he did not operate intrastate, and such permit was granted prior to the advent of the Federal Motor Carrier Act, and he was not operating under any authority granted by the Federal body, but only under a State permit legally issued to him by the State regulatory body. Of course, in such a case as that the State had the authority to decide if their State law had been violated.

Said the court at page 273:

> "Second. When the Commission revoked the permit, the Interstate Commerce Commission had not acted upon appellant's application under the Federal Motor

Carrier Act and meanwhile the authority of the state body to take appropriate action under the state law to enforce reasonable regulations of traffic upon the state highways had not been superseded."

Thus it is submitted that in this case if the Interstate Commerce Commission had not acted the case would be analogous, but once the Interstate Commerce Commission has acted as here by the granting of an order authorizing the operations involved, the State's power to act is superseded and ousted entirely.

Furthermore, the petitioners in the present case have applied for and obtained authority from the State commission for all of its operation in intrastate commerce. The Pennsylvania State commission does not now have, nor ever has had, authority to issue certificates for interstate operations. Thus the interstate operations of petitioners always have been and are now only under the authority of the Interstate Commerce Commission. Here no order of the State commission is violated.

WHEREFORE petitioners pray that your Honorable Court will issue a writ of certiorari to review the final decision of the Superior Court of Pennsylvania.

Respectfully submitted,

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